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EXAMINER

GROSSO, HARRY A

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/630,378
Filing Date: July 30, 2003
Appellant(s): D'AMATO, GIANFRANCO

MAILED
FEB 01 2007
Group 3700

Brian R. Tumm
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed December 4, 2006 appealing from the Office action mailed May 25, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

56-156777	JAPAN	11-1981
6,210,766	MCLAUGHLIN et al	4-2001

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4,863,014	SUMMONS et al	9-1989
4,574,987	HALLIGAN et al	3-1986
4,324,338	BEALL	4-1982

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 1,2, 4-10, 12-20, 22-27, 29-31, 33 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over JP 56-156777 in view of McLaughlin (6,210,776) and Summons et al (4,863,014).
2. Regarding claim 1 and 5, as disclosed by applicant in the specification of the instant invention and in Figure 4, JP 56-156777 teaches a collapsible container with the overlap and the bent opening edge but does not teach the at least two layers of transparent fluid tight material. McLaughlin teaches a collapsible tube formed in a similar manner to JP '777 with at least three layers of fluid tight materials (plastic) and a holographic decoration on an inner layer (14). The outer layer of McLaughlin is inherently transparent since the decoration is on the inner layer (14 Figure 1). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of the multi-layer material of McLaughlin, including an inner layer with an image or decoration, to provide a container that is fluid tight and provides a longer shelf life due to the barrier properties of the laminate of McLaughlin.

JP '777 and McLaughlin do not teach the at least two transparent layers.

Summons et al teaches a collapsible tube that is constructed of multiple layers of plastic material, including a gastight layer, with indicia on one of the layers and all of the layers

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being transparent in at least some portion of the tube to allow for observation of the contents and the amount of material in the container. It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the multi-layers of the combination of JP '77 and McLaughlin transparent and include a gastight barrier layer as taught by Summons et al to provide a container that is gastight with the capability to inspect the contents and determine the quality and amount of the contents in the container.

3. Regarding claim 2, the blank of JP '777 is two dimensional (Figure 1) and the container of JP' 777 as modified by McLaughlin and Summons et al would allow filling of the container to be monitored.

4. Regarding claim 4, the junction of JP '777 satisfies the claim limitation of the "perfect permanent junction." McLaughlin discloses a similar junction (Figure 3, column 3, lines 47-49).

5. Regarding claim 6, the layers are elastic and ductile to allow forming of the container and are dimensionally stable after shaping in that the tube will retain its shape after shaping of the container.

6. Regarding claim 7, the layers are liquid tight and gastight as discussed in claim 1 above.

7. Regarding claim 8 and 9, the layers of McLaughlin overlap and are fluid tight (Figure 4, column 1, lines 23-43).

8. Regarding claim 10 and 17, McLaughlin discloses a print on one of the layers.

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9. Regarding claims 12-14, 16 and 18, McLaughlin discloses a laminate with specific layers of the material (Figures 1 and 2 and column 3, lines 18-57). 14 is the central layer and is the same material as applicants. The outer layer is 12 and the inner layer is 22, both of which are the same as the applicants.

10. Regarding claim 15, Summons et al discloses that it is known in the art to use ultrasonic welding for sealing of plastic layers together. It would have been obvious to use layers of material that are ultrasonic absorbent to allow the use of a technique that is known in the art (column 4, lines 55-65).

11. Regarding claims 19 and 20, JP '777 and McLaughlin disclose a closed end formed by connecting lower end sections. The process step of pressing one to another before they are connected does not require any structure that is not in the combination of references.

12. Regarding claim 22, the container is a cup and is circular in cross-section as seen in JP '777, Figure 4.

13. Regarding claims 23-25, the printing is a hologram and is capable of behaving exactly like that of applicant. The container is transparent as discussed in claim 1, thus the undecorated areas are the control window.

14. Regarding claim 26, the intended use does not require any structure not in the references. The claimed invention is disclosed except for the nature of the print. It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the print in such a way that is only visible after part of the contents is removed since it has been held that optimization of a results effective variable involves only

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routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

Making the print only visible after part of the contents is removed is a results effective variable.

15. Regarding claim 27, see Figures 4 and 5 of JP '777 where the angle is bent at least 90 degrees.

16. Regarding claim 29, since the materials of modified container JP '777 are the same as that of applicant the modified container of JP '777 will perform the claimed function.

17. Regarding claim 30, the modified container of JP '777 is tapered and capable of stacking.

18. Regarding claim 31, the materials of the modified container of JP '777 are that of applicant. See McLaughlin where the materials of layers 12-14 and 22 are that of applicant.

19. Regarding claim 33, see Figure 1 of JP '777 where the container begins as a blank.

20. Claim 32 is rejected under 35 U.S.C. 103(a) as being unpatentable over JP '777 in view of McLaughlin and Summons et al as applied to claim 1 and further in view of Halligan et al (4,574,987). The container of the invention is disclosed except for the air space in or between the layers. Halligan et al discloses an air space between layers of a similar container to provide an insulating layer (10, Figures 2 and 3, column 2, lines 1-9, column 3, lines 42-44). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of an air space between

layers as disclosed by Halligan et al in the modified container of JP '777 to provide an insulating layer and make the container more suitable for frozen products as taught by Halligan et al.

21. Claim 34 rejected under 35 U.S.C. 103(a) as being unpatentable over JP '777 in view of McLaughlin, Summons et al and Beall (4,324,338). JP '777 as modified by McLaughlin and Summons et al discloses all of the claimed structure, as discussed above, except the lid with a lid handle projecting outwardly from an edge of the lid.

JP' 777 discloses the lid (6, Figure 5) but not the lid handle. The modified container of JP'777 is conical-shaped. Beall discloses a similar lid on a container (44, Figure 5) with a handle (46) that projects outward from as edge of the lid and beyond the edge of the container. It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of a lid with a handle as disclosed by Beall in the modified container of JP '777 to provide a lid with a handle to facilitate easier removal of the lid.

22. Claim 35 is rejected under 35 U.S.C. 103(a) as being unpatentable over JP '777 in view of McLaughlin, Summons et al and Beall as applied to claim 34 and further in view of Halligan et al (4,574,987). The container of the invention is disclosed except for the air space in or between the layers. Halligan et al discloses an air layer between layers of a similar container to provide an insulating layer (10, Figures 2 and 3, column 2, lines 1-9, column 3, lines 42-44). It would have been obvious to one of ordinary skill in the art at the time the invention was made to have incorporated the use of an air space between layers as disclosed by Halligan et al in the modified container of JP '777

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to provide an insulating layer and make the container more suitable for frozen products as taught by Halligan et al.

(10) Response to Argument

CLAIM 1

Appellant argues that there is no motivation to combine the JP '777, McLaughlin and Summons references to obtain a container having at least two transparent layers. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, McLaughlin and Summons are tube type containers, JP '777 is a laminate of stiff paper with polyethylene on both sides, McLaughlin and Summons are multi-layer plastic laminates. McLaughlin is used to teach the use of the multi-layer all plastic material and Summons is used to teach the use of multiple transparent layers. One of ordinary skill in the art would be knowledgeable in the use of multi-layer plastic laminates for tube type containers.

Appellant argues that McLaughlin does not have a withdrawal opening with a bent edge. McLaughlin is not relied upon for these limitations as they are provided in the base reference JP '777.

Appellant argues that McLaughlin and Summons disclose containers intended for different use than the container of the application. Both McLaughlin and Summons are

tube type containers. The intended use of the containers is not material to their ability to teach the multi-layer container structure.

Appellant argues that McLaughlin and Summons and, by extension, JP '777 as modified by McLaughlin and Summons would not be dimensionally stable after shaping. The claims are unclear as to when the container is to be dimensionally stable. The phrase "after shaping" does not define what shaping is intended. The container of JP '777 as modified by McLaughlin and Summons would be dimensionally stable in the blank form in that once the blank is cut the multi-layer laminate would have established dimensions. The container of JP '777 as modified by McLaughlin and Summons would be dimensionally stable after assembly into the container form with the bent edge of the withdrawal opening maintaining the dimensions of the opening and the length and width dimensions of the container being established by the forming process.

Appellant argues that the container of JP '777 as modified by McLaughlin and Summons would not be dimensionally stable since the containers of McLaughlin and Summons would not return to their original position after being squeezed to remove a portion of the stored material. The behaviour of the McLaughlin and Summons containers in this respect is to some extent a function of the structure of the containers at their open ends. The container of JP '777 as modified by McLaughlin and Summons would have the withdrawal opening of JP '777 allowing the stored material to more easily return into the container restoring it to its original position. The nature of the response of the filled container to an applied squeezing force would depend on the product in the container and the amount of force applied. The dimensional stability

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limitation as related to the behaviour of the filled container during use is not recited in the claims.

CLAIM 2

Appellant argues that the container of JP '777 as modified by McLaughlin and Summons would not meet the claim limitation of the transparency of said container enabling filling to be monitored. The container of JP '777 as modified by McLaughlin and Summons would be transparent thus allowing the monitoring of the interior of the container and the contents for any purpose during filling or during use.

CLAIM 5

Appellant argues there is no motivation to combine JP '777, McLaughlin and Summons to provide three transparent layers. The question of motivation was addressed in the response to the argument for claim 1.

CLAIM 6

The claim recites an elastic layer that will be dimensionally stable after shaping. Summons discloses an elastic layer. Appellant argues the elastic layer of Summons is clearly not dimensionally stable and the container of JP '777 as modified by McLaughlin and Summons would not be dimensionally stable. The elastic layer of the modified container of JP '777 will be dimensionally stable once it is part of the laminate and will remain dimensionally stable throughout any shaping in the same sense as the container as a whole will remain dimensionally stable as discussed above.

CLAIM 25

Appellant argues that in the container of JP '777 as modified by McLaughlin and Summons the holographic print would not leave an open control window on the wall. McLaughlin discloses a hologram formed on a film layer to provide a background decoration. McLaughlin defines decoration as indicia placed on the tube such as brand names, designs and general information. Indicia of this type would typically not cover the entire surface of the tube and any undecorated areas would constitute control windows.

CLAIM 26

Appellant argues that the limitation of "the print only visible after at least a part of the food is removed" is not taught by any of the references. Appellant states this occurs when the print is of a corresponding color as the food in the container and provides a yes/no indication for the presence of product in the container. This is an intended use that does not require any structure not in the references. It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the print in such a way that is only visible after part of the contents is removed since it has been held that optimization of a results effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980). Making the print only visible after part of the contents is removed to provide a yes/no indication of product in the container is a results effective variable.

CLAIM 30

Appellant argues the container of JP '777 as modified by McLaughlin and Summons would not be capable of being stacked or unstacked. The container of JP

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'777 as modified by McLaughlin and Summons is a tapered container and would certainly be capable of being stacked one inside the other when empty. Additionally, the container would be capable of being stacked in other orientations as well.

CLAIM 32

Appellant argues there is no motivation to combine the container of JP '777 as modified by McLaughlin and Summons with Halligan to provide an insulating section of air within or between layers. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, JP '777, McLaughlin and Summons are multi-layer tube type containers. Halligan discloses a multi-layer tube type container with an air space between two of the layers to provide an insulating layer. Knowledge in the area of insulating layers used in multi-layer tube type containers would be generally available to one of ordinary skill in the art.

CLAIM 34

Appellant argues that the references do not disclose or teach a container with first, second and third transparent layers with an elastic layer, a liquid impermeable layer and a gas impermeable layer or a container that is dimensionally stable with a print preventing viewing through the container except for a control window. JP '777 as modified by McLaughlin and Summons provides a container with at least three

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transparent layers of fluid tight materials (plastic) and Summons discloses an elastic layer and a gas impermeable layer. The modified container is dimensionally stable as discussed above and the holographic printing would prevent viewing through the container in the areas of the printing and provide a control window in areas not printed. Appellant argues that there is no motivation to combine JP '777, McLaughlin and Summons. This has been addressed in the argument for claim 1.

Appellant argues that the Beall reference does not disclose the same container as applicant or the modified container of JP '777 and there is no motivation to combine Beall with the other references. Beall is relied upon to teach the use of a lid handle projecting outwardly from the edge of a lid. The rest of the structure is provided by the other references. Beall teaches a lid similar to the lid of JP '777 sealed to the top edge of a container with a handle projecting outward from the edge of a lid. One of ordinary skill in the art would be knowledgeable of lids sealed to the top edge of containers and handles on these lids.

CLAIM 35

Appellant argues that claim 35 is allowable for the same reasons as claim 34. The response to the argument for claim 34 again applies.

Appellant also argues that the insulating section of air is not taught as discussed in the argument for claim 32. The response provided in the argument for claim 32 again applies.

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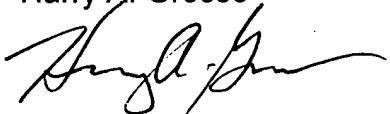
(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Harry A. Grosso



Conferees:


Anthony Stashick
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